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No. 94-1467

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TAMPA CROWN DISTRIBUTORS, INC.,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION; and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal First District, State of Florida

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Rule 12.4 of the Rules of this Court relieves parties subject to adverse judgments from the obligation of seeking review in this Court or of taking any other action to preserve their claims.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

This case involves a suit by petitioner seeking a refund of taxes paid under a Florida statute declared unconstitutional by the Florida Supreme Court. *See Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So. 2d 1000 (Fla. 1988) (*McKesson* I). The Florida Supreme Court denied the claim for refund, *id.* at 1009-10, and petitioner did not seek further review of that judgment. After the decision of this Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) (*McKesson* II)—holding that another Florida taxpayer denied a refund in *McKesson* I was entitled to some form of retroactive relief—petitioner attempted to pursue its claim for refund during proceed-

ings on remand. The Circuit Court held that petitioner was entitled to do so, but the District Court of Appeal reversed, holding that petitioner, by its failure to seek review of the judgment denying its claim for refund, had failed to preserve that claim.

1. The history of this litigation is set forth in the opinion of the District Court of Appeal. Pet. App. 2-5. It begins with a lawsuit filed by petitioner contending that certain provisions of Florida law taxing alcoholic beverages violated the Commerce Clause and seeking a refund of taxes paid under those provisions.[1] In a separate suit McKesson Corp. challenged the same provisions on the same grounds, likewise seeking a refund of taxes paid. The Circuit Court held in each case that the statute violated the Commerce Clause, but it denied both claims for refunds, concluding that its decisions should be applied prospectively.

The State defendants appealed both judgments invalidating the statute, while petitioner and McKesson separately appealed the judgments rejecting their claims for refunds. The District Court of Appeal consolidated the cases and certified them to the Florida Supreme Court. The Supreme Court then affirmed the judgments in their entirety. It agreed with the Circuit Court that the statute discriminated against interstate commerce in violation of the Commerce Clause, but it also agreed that the proper remedy was to invalidate the statute on a prospective basis. It held, therefore, that the claims for refunds had properly been denied.

2. Petitioner did not seek review of the judgment affirming denial of its claim for a refund. Nor did it seek

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[1] The challenged provisions imposed a tax on the sale of alcoholic beverages by distributors (like petitioner) but established preferences for products made from specified citrus and grape products and, for liquors, from specified sugarcane products. *See* Fla. Stat. §§ 564.06(2), 564.06(3), 564.06(4), 565.12(1)(b), 565.12(2)(b) (1985).

to attack that judgment in any other way. Thus, while McKesson did file a petition in this Court, challenging that part of the judgment denying it a refund, petitioner did not join in that petition or take any action to support it. Indeed, during the proceedings in this Court—through the petition stage, on briefing, and on argument and reargument—petitioner took no action at all with respect to the issues presented by McKesson.

This Court ultimately reversed the Florida Supreme Court, holding that the State, while not necessarily required to provide McKesson with a refund, was required to provide some meaningful retroactive relief. *See* 496 U.S. at 31-52. After the case was remanded to the state courts, respondents decided to cure the constitutional defect retroactively by eliminating the preferences for local products and assessing back taxes on their sales.[2] McKesson challenged this remedy, and petitioner sought to intervene in the *McKesson* case, arguing that it would be affected by the decision. The Circuit Court granted the motion to intervene for the limited purpose of challenging the remedy selected by respondents.

The District Court of Appeal reversed. Although petitioner argued that it stood in the same position as McKesson with respect to its claim for a refund—citing Rule 12.4 of the Rules of this Court, which provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court"—the court held that petitioner "was required to take some affirmative act before the United States Supreme Court in order for its refund request to survive."

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[2] In its opinion this Court had stated that, as an alternative to providing a refund to taxpayers, "to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." 496 U.S. at 40. *See also id.* at 51 (noting option of "an offsetting charge to previously favored distributors").

Pet. App. 6. Thus, in its view, "even if Tampa Crown were automatically made a party under rule 12.4, in order for its claim for relief to prevail, Tampa Crown was required to take further action in the Supreme Court, by filing either a notice informing the clerk of its continuing interest in the case or a brief adopting McKesson's brief." Pet. App. 7. Having stated its view that petitioner was not "a party before the Supreme Court in *McKesson* II," Pet. App. 8, the court went on to conclude that its failure to seek review made the judgment in *McKesson* I *res judicata* on the merits of its refund claim: "Because Tampa Crown did not seek review in the United States Supreme Court of the Florida Supreme Court's decision making its rulings prospective, Tampa Crown must be considered to have accepted that decision and, therefore, to have no interest in any remaining litigation." Pet. App. 9.

ARGUMENT

The decision in this case does not merit further review. Although it is possible that Tampa Crown was a nominal respondent in the *McKesson* case before this Court, *see* page 5 *infra* and note 3, the court below was nevertheless correct that Tampa Crown—by declining to seek review or, indeed, to take any action at all in the case—had failed to preserve its claim for a refund. Moreover, the issue raised by Tampa Crown appears to be of little practical importance. The only decision expressly supporting its position was handed down more than 25 years ago, thus belying any serious notion of "Confusion in the Lower Courts" (Pet. 16), and those losing parties wishing to preserve their rights may do so in the usual manner by seeking review in this Court. The petition, therefore, should be denied.

1. To the extent that the decision below states that petitioner was not a party at all to the *McKesson* case

before this Court, it is, at least, open to question.[3] But the relevant question is not whether petitioner was nominally a party to *McKesson* II, but whether it preserved its claim for relief from the judgment denying it a refund. The court below held that it had not, Pet. App. 9, and petitioner has done little to show that its holding is incorrect or of great significance to other litigants.

The accepted procedure for obtaining review in this Court is by filing a petition for a writ of certiorari, within the time limits established by Congress in 28 U.S.C. § 2101(c). That section provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." This limitation is jurisdictional: as the Court has noted, " '[w]e have no authority to extend the period for filing except as Congress permits.' " *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 543 (1994) (quoting *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990)). It is undisputed here, of course, that petitioner *never* sought review of the judgment denying it a refund, much less within the time period specified by Congress in Section 2101(c).

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[3] The answer to the question appears to turn on the application of the word "proceeding" in Rule 12.4 to the facts of this litigation. Petitioner and McKesson prosecuted separate cases in the Florida courts, and, while the cases were consolidated for purposes of appeal, they remained wholly separate. *See, e.g., Wagner v. Nova University, Inc.*, 397 So. 2d 375, 377 (Fla. 4th DCA 1981); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933). At no time, therefore, was petitioner a party to the *McKesson* case. If that case is the "proceeding" brought by McKesson to this Court, then the argument made by petitioner founders on its own premise: petitioner was not a party to the proceeding below and, as a result, not even a nominal party to the case before this Court. Because we believe that the petition should be denied in any event, we will assume for purposes of further discussion that petitioner was a nominal respondent in *McKesson* II.

The failure of petitioner to file a petition means that it must rely on the petition filed *by McKesson* to keep its own refund claim alive. But that theory—that an appeal by one is effectively an appeal by all—is directly contrary to prevailing law. This Court has observed " 'the generally accepted rule in civil cases that where less than all of the several co-parties appeal from an adverse judgment, a reversal as to the parties appealing does not necessitate or justify a reversal as to the parties not appealing.' " *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 (1981) (quoting *National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, 1124 (D.C. Cir. 1976)). As a result, despite an appeal by some parties, the judgment with respect to parties not appealing becomes binding as a matter of *res judicata*. *Id.* at 398-400.

Although petitioner contends that Rule 12.4 alters these accepted principles, there is no good reason to think that it was intended to do so. Indeed, the predecessor to Rule 12.4 (former Rule 19.6) was adopted for quite different reasons: to assure that *adverse* parties were aware of a petition for review. *See Diamond v. Charles*, 476 U.S. 54, 63 n.14 (1986). Thus, the authors of the Third Edition of Supreme Court Practice had recommended that the prior rules be amended "to make more explicit the need for serving and naming all adverse parties who would be prejudiced by the relief sought in the Supreme Court . . . ." R. Stern & E. Gressman, *Supreme Court Practice* § 6.35 at 241 (3d ed. 1962). *See also Diamond v. Charles*, 476 U.S. at 63 n.14 (referring to this discussion). Given this intention, it is implausible to read the amended rule as also relieving losing parties from the traditional obligation of filing, or joining, a timely petition for certiorari in order to obtain reversal of an unfavorable judgment.

There are, in fact, strong indications that point the opposite way. Rule 12.2, for example, explicitly states that "[a] party who is not shown on the petition for a

writ of certiorari to have joined therein at the time the petition is filed with the Clerk may not thereafter join in that petition." This Rule thus makes clear that, while parties to a judgment below may file separately or join in a petition, parties foregoing those options may not, after-the-fact, attach themselves to a petition already filed. That prohibition, added in the 1990 revision of the Rules, seems quite at odds with any notion that, to challenge a judgment, persons adversely affected may simply rely on other parties and need not file a petition at all.[4]

This Court has also made clear that the presence of a party as a nominal appellee (under the analogous rule for appeals to this Court) is very different from presence as an appellant. *See Diamond v. Charles*, 476 U.S. at 62-64 (discussing former Rule 10.4 (now Rule 18.2)). There, rejecting the argument that a nominal respondent (the State of Illinois) could serve as "the functional equivalent of an appellant," *id.* at 62-63, the Court stated flatly that "status as a 'party' does not equate with status as an appellant." *Id.* at 63. Although the State had filed a letter expressly supporting the position taken by the appellant—far more, of course, than petitioner here did in *McKesson* II—the Court held that this expression of interest was not enough to give it the necessary stake in the case: "By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute." *Id.* at 63. In this case, the Florida District Court of Appeal applied precisely the same reasoning to hold that petitioner could no longer press its claim for refund, noting that, by its failure to seek review of the Florida Supreme Court decision, it "must be considered to have accepted that decision and, therefore, to have no interest in any remaining litigation." Pet. App. 9.

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[4] It is also well-accepted that an extension of time granted to one party affected by a judgment below does not extend the time to petition for other parties. *See* R. Stern, *et al.*, *Supreme Court Practice* § 6.5 at 291 (7th ed. 1993).

We find nothing, therefore, in Rule 12.4, or in any other Rule of this Court, that purports to allow losing parties to forego a petition for certiorari and obtain reversal of an adverse judgment on the basis of a petition filed by someone else. But, even if the failure to petition were not an absolute bar, it is difficult to see the basis for providing relief to nominal respondents that do nothing at all to inform the Court or other parties of a continuing interest in their claims. *Compare Director, OWCP v. Perini North River Associates,* 459 U.S. 297 (1983) (nominal respondents actively supported position of petitioner); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (nominal respondent argued for reversal of judgment). Even a party meeting the jurisdictional requisites for obtaining relief may be denied relief for failing to take additional steps to press its claim. *See e.g.*, Fed. R. App. P. 3(a); *Stotler and Co. v. Able*, 837 F.2d 1425 (7th Cir. 1988) (dismissing appeal for failure to file timely brief). At most, Rule 12.4 would seem to assure that an entity interested in a judgment will have an opportunity to participate before this Court if it chooses to do so. As the Seventh Circuit has observed, however, "[i]t is not a mechanism by which parties . . . can deliberately bypass a Supreme Court proceeding and then attempt to reap the benefit of a judgment favorable to the other parties." *Local 322 v. Johnson Controls, Inc.*, 969 F.2d 290, 293 (7th Cir. 1992). That is precisely what petitioner here is seeking to do.

2. Petitioner has also failed to show that the issue is of any practical importance. To begin with, it appears to arise with great infrequency. Although petitioner claims that there is "Confusion In The Lower Courts" (Pet. 16) over the issue, that claim ultimately rests upon the existence of one decision—rendered with little analysis, more than 25 years ago—holding that a petition for one party is presumptively for the benefit of all parties. *See Provident Tradesmens Bank and Trust Co. v. Lum-*

bermens Mutual Casualty Co., 411 F.2d 88 (3d Cir. 1969). That one dated case hardly demonstrates widespread confusion among lower courts, much less confusion of such immediacy and importance as to warrant the attention of this Court.

The issue lacks importance for a second reason as well: it is easily avoided. The common, everyday procedure for obtaining relief from an adverse judgment is to file a petition for certiorari in this Court. In situations where more than one party is affected by a judgment, the rules provide, as we have noted, that the parties may employ the convenience of filing a single petition. S. Ct. R. 12.2. Or, if the parties prefer, they may file separate petitions, making appropriate references each to the other. *Id.* Thus, any party adversely affected by a judgment has a ready, well-understood means of obtaining review.

The problem here, therefore, is not one that many litigants can be expected to face. It arises simply because petitioner failed to take the necessary steps to preserve its claim in the face of an unfavorable judgment. Petitioner may now regret that failure, but its second thoughts do not justify review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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